

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED ELI JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 22, 2009

No. 284608

Oakland Circuit Court

LC No. 2007-214086-FC

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to life imprisonment without parole for his conviction. This case arises from the strangulation death of the victim, Marcia Stewart. Defendant and the victim were on and off romantic partners since 2004. Because the trial court did not abuse its discretion on the challenged evidentiary issues and there was sufficient evidence to establish that defendant committed first-degree premeditated murder, we affirm.

Defendant alleges that the testimony of Chiquila Williams was inadmissible hearsay, was not credible and was barred by MRE 403. Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). An abuse of discretion will not be found where the trial court's decision is within the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "A determination of the prejudicial effect of evidence is best left to a contemporaneous assessment of the effect, presentation, and credibility of testimony by the trial court. Accordingly, a defendant must meet a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403." *People v Albers*, 258 Mich App 578, 588-589; 672 NW2d 336 (2003) (internal quotations and citations omitted). The decision to admit evidence "frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003) (internal quotations and citations omitted).

MRE 803(3) provides that "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling,

pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will" is not excluded by the hearsay rule. When determining if evidence is admissible pursuant to MRE 803(3), "[a] proper analysis requires consideration of the nature of the statements and the purpose for which the statements were offered." *People v Moorero*, 262 Mich App 64, 66; 683 NW2d 736 (2004). Because defendant failed to identify the specific statements he wishes to challenge on appeal and failed to fully analyze this issue, this issue is abandoned because we cannot properly engage in an analysis as contemplated by *Moorero*, *supra* at 66. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.").

Nevertheless, we have fully considered this issue and conclude that defendant is not entitled to relief. At trial, Williams testified that the victim stated that defendant threatened to kill her and that defendant was physically violent towards her in the months before the murder. Defendant is correct that this testimony was inadmissible pursuant to MRE 803(3) because these statements described "the past or presumed future actions of defendant" and not the intentions and plans of Stewart. In *Moorero*, *supra* at 73, this Court clarified that witness testimony regarding the victim's statements that defendant threatened to kill the victim, that defendant was looking for him with a gun and that they had a verbal confrontation were inadmissible under MRE 803(3) because the statements described "the past or presumed future actions of defendant." However, reversal based on the inadmissible evidence is only required if "it affirmatively appears that it is more probable than not that the error was outcome determinative." *Moorero*, *supra* at 74. In the present case, several other witnesses testified that defendant threatened to kill Stewart and that defendant was physically violent toward Stewart. Defendant also admitted to the physical altercation, about which Williams testified, between him and Stewart. Because of the substantial evidence presented at trial regarding defendant's threats and physical violence toward Stewart, defendant cannot show that the admission of Williams' testimony was outcome determinative.¹ Thus, defendant has not shown error requiring reversal. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant also argues that Williams' testimony was not credible. He specifically argues that Williams indicated during her testimony that she did not believe statements made by Stewart. Defendant misconstrues Williams' testimony. Regardless, it is the task of the jury to assess the credibility of witnesses and this Court will not interfere with the jury's credibility

¹ The facts of the instant case are unlike those in this Court's recent decision in *People v Smelley*, ___ Mich App ___, ___ NW2d ___ (2009), wherein the prosecutor's case was based almost solely on inadmissible hearsay evidence and the only other evidence brought forth by the prosecutor that the defendant in that case shot and killed the victim was questionable witness testimony that was tenuous at best.

determination. See *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999) (Weighing the evidence and assessing the credibility of witnesses is a task for the jury).

Defendant next argues that Williams' testimony was inadmissible under MRE 403, which states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Contrary to defendant's assertions, the challenged evidence was highly probative to demonstrate a lack of accident, motive, premeditation, and intent. Though there is no doubt the evidence was prejudicial, defendant fails to articulate how the evidence was unfairly prejudicial as required by MRE 403. *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) ("The inquiry pursuant to MRE 403, however, is whether the disputed evidence was unfairly prejudicial. After all, presumably all the evidence presented by the prosecutor was prejudicial because it attempted to prove that defendant committed the crime charged."). Moreover, in light of the other evidence and other witness testimony, no error requiring reversal exists. *Lukity, supra*.

Defendant next argues that there was insufficient evidence to establish that Stewart's murder was premeditated. We review a claim of insufficient evidence de novo, viewing the evidence in a light most favorable to the prosecution, to determine whether the evidence would justify a rational trier of fact finding that the defendant was guilty beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). "To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated." *People v Haywood*, 209 Mich App 217, 229-230; 530 NW2d 497 (1995); MCL 750.316(1)(a). "Premeditation may be inferred from, among other things, the defendant's actions before and after the crime and the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted," *People v Berry*, 198 Mich App 123, 128; 497 NW2d 202 (1993), and the parties' prior relationship. *Haywood, supra* at 229. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "Manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.' Moreover, a defendant's attempt to conceal the killing can be used as evidence of premeditation." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (internal citation omitted).

Defendant asserts that because Stewart's death may have occurred in less than a minute, there was no proof the murder was premeditated. However, expert medical testimony at trial established that Stewart's death was a result of the occlusion of the carotid arteries and the jugular veins and that death by this means would likely occur within three to five minutes. Moreover, Stewart suffered defensive wounds to her hands, and defendant attempted to conceal his crime by turning on the air-conditioning in the winter, covering the body with bed linens, declining housekeeping services, paying for another day at the hotel, and evading capture for several days. Evidence at trial also established that defendant was jealous of Stewart's relationship with another man, and that he threatened and stalked Stewart. This behavior combined with a note written by defendant and placed in Stewart's purse, indicating that her death was a result of a disagreement between her and defendant regarding money and her relationship with another man, contradicted defendant's testimony that the murder was accidental.

and committed in the heat of passion. Based on this testimony, the nature of the strangulation, the reasonable inference from the evidence that Stewart struggled before she was rendered unconscious, and the length of time to achieve death provided circumstantial evidence that defendant was provided with a second look before Stewart died. Thus, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to establish that Stewart's murder was premeditated. *Gonzalez, supra* at 641; *Schollaert, supra* at 170-171.

Defendant next contends that the trial court abused its discretion when it admitted two notes written by defendant. The first note was the one defendant placed in Stewart's purse, explaining the nature of the controversy between the victim and defendant. The other was defendant's suicide note left at his family's house. First, defendant argues the notes were immaterial. Because defendant failed to rationalize, explain, analyze or support this claim in his brief, this issue is abandoned. *Mitcham, supra* at 203. Nevertheless, we find no merit in defendant's contention. "In order to be material, the fact must be within the range of litigated matters in controversy." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008). All elements of the criminal offense are in issue. *People v Mills*, 450 Mich 61, 69-71; 537 NW2d 909 (1995), modified on other gds 450 Mich 1212 (1995). The intent of defendant is a direct issue if it was an element of the charged offense. *Id.* at 71. Because the prosecution was required to establish that defendant intended to kill the victim and that the act of killing was deliberate and premeditated and because both notes were pertinent to premeditation, intent, motive and lack of an accident, these notes were material to the case. *Id.* at 69-71; *Haywood, supra* at 229-230; MCL 750.316(1)(a).

Second, defendant argues that the probative value of the notes was substantially outweighed by the prejudicial effect. MRE 403 prohibits the admission of evidence "if its probative value is substantially outweighed by the danger of unfair prejudice" "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). The probative value of the evidence is the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Mills, supra* at 68. Any tendency is sufficient probative value. *Id.* "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* at 75.

The note written by defendant and found in Stewart's purse indicated that defendant killed Stewart because of a dispute over money and because of Stewart's relationship with another man. This note did not make any mention that the murder was accidental or that it was committed in the heat of passion. The note made it more probable that defendant intended to kill Stewart and that the crime was premeditated. See *Mills, supra* at 78 (holding the photographs were probative because they made it more probable that the defendants intentionally set [] [the victim] on fire.). Defendant's suicide note was also highly probative of defendant's guilt because, in the note, defendant apologized to his family, asked for their forgiveness, and stated that Stewart was dead. The jury could interpret defendant's apology as consciousness of guilt. Despite defendant's claims that Stewart's death was accidental, this note does not make any reference to an accident. Consequently, the notes make it more probable that defendant

intentionally committed a premeditated murder. *Id.* Both of the notes were a necessary component of the prosecutor's case and made it more probable that Stewart's death did not occur as claimed by defendant. Nothing in the record supports that the evidence was given undue weight by the jury or that the use of this evidence was inequitable. *Blackston, supra* at 462.

Defendant finally argues that the trial court abused its discretion when it permitted five witnesses to testify about defendant's threats to and/or about Stewart. Specifically, defendant contends this evidence was cumulative and prejudiced the jury. MCL 768.27 provides:

In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

MCL 768.27 is the Legislature's version of MRE 404(b). *People v Smith*, 282 Mich App 191, 204; ___ NW2d ___ (2009). Both MCL 768.27 and MRE 404(b)(1) pertain to other-acts evidence. On appeal, defendant specifically challenges the witnesses' testimony of the threats defendant made to and/or about Stewart. However, these threats were not other-acts evidence as defined by MCL 768.27 and MRE 404(b)(1). *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988) ("A statement of general intent is not a prior act for the purposes of MRE 404(b)."). Consequently, "the appropriate analysis is whether the prior statement is relevant, and if so whether its probative value outweighs its potential prejudicial effect." *Id.* at 518. Evidence that defendant threatened Stewart in the days and months before her murder was highly relevant and highly probative to demonstrate his intent, motive, and premeditation and to challenge his assertion that Stewart's death was an accident. See *People v Melvin*, 70 Mich App 138, 142-143; 245 NW2d 178 (1976). Contrary to defendant's claims, the fact that these threats were made as far back as three months before Stewart's murder did not make them irrelevant or unduly prejudicial. See *People v Miller*, 211 Mich App 30, 39; 535 NW2d 518 (1995) ("Although the tape was made about ten months before the killing (and it is therefore arguable whether the defendant's intent remained the same), this does not affect the admissibility of the evidence."). MRE 403 provides that evidence may be excluded if it is a "needless presentation of cumulative evidence." However, all five witnesses testified to different threats defendant made about and/or to Stewart. Thus, there was not a needless presentation of cumulative evidence as claimed by defendant and as barred by MRE 403. Because this evidence was relevant and highly probative, defendant has failed to meet the high burden to demonstrate he was unfairly prejudiced by this evidence. *Albers, supra* at 588-589.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens